United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MARIA AMACKER, ET AL.,
Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILROAD CO.,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

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STATEMENT OF THE CASE.

This case comes to this Court on a writ of error to the Circuit Court of the United States for the District of Montana (Record, p. 1), to reverse the final judgment of that Court (Record, p. 42), which judgment was in favor of the defendant in error (being the plaintiff in the court below), and against the plaintiffs in error (being the defendants in the court below). The cause was tried without a jury, a

stipulation in writing, and signed by the attorneys for all the parties, having been filed before and at the commencement of the trial, to the effect that a jury was waived and said cause should be tried to the Court without a jury. (Record, pp. 9 and 10.) The Court filed its findings of fact, (Record, pp. 38-42), and ordered judgment in favor of defendant in error, (Record, p. 22,) and judgment was entered accordingly. (Record, pp. 42-43.)

The plaintiffs in error, during the progress of the trial, excepted to certain rulings of the Court, as specified in the assignment of errors annexed to and returned with the writ of error (Record, pp. 45 and 46,) and particularly set forth in the bill of exceptions (Record, pp. 22-37,) which was allowed by the Judge before whom said case was tried.

The defendant in error in its complaint (Record, pp. 3 & 4,) alleges in substance that at all times mentioned it was, and now is, a corporation created by an act of Congress, approved July 2, 1864, and acts and joint resolutions amendatory thereof; that it was the owner of and entitled to possession of the south half of the northwest quarter of section seventeen (17), township ten (10) north of range three (3) west of the principal meridian of Montana; that on the —— day of ————, 1890, the plaintiffs in error entered into the possession thereof and ousted it therefrom, and now unlawfully withhold possession thereof; that the land is of the value of over ten thousand dollars.

To this complaint the plaintiffs in error filed their answers (Record, p. 6-9), in which they specifically denied that

defendant in error is or ever was the owner of or entitled to the possession of any of the real estate mentioned, or that they, or any of them, ever ousted or ejected plaintiff in error therefrom or unlawfully withheld the possession thereof, or any thereof, from plaintiff.

Thereafter the Court, on the 14th day of November, 1892, one of the days of the term at which said cause was tried, filed its special findings of fact (Record, pp. 38 to 42,) and judgment was ordered for defendant in error.

One of the specifications of error is that the special findings of the Court are not sufficient to support the judgment. (Record, p. 46.)

The findings of the Court present the facts in the case fully, and are as follows (Record, pp. 38 to 42 :)

FINDINGS OF FACT.

First. That on the 2d day of July, 1864, the United States of America granted to the plaintiff herein, its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific Coast, and for other purposes, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title,

not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of said sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

And that it was provided in the Act of Congress by which the said grant was made "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company, as provided in this act; but the provsions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the

government at a price less than two dollars and fifty cents per acre when offered for sale."

2d. That plaintiff accepted the grant and constructed the road named in the act of Congress making the same.

3d. That the land in dispute is a part of an odd section within twenty miles of the definite line of said road, fixed as required by said act; and that the only title which plaintiff has or claims to have to said lands is under and by virtue of said act.

4th. That on the 21st day of February, 1872, plaintiff filed in the office of the Commissioner of the General Land Office its map of general route of said road; and that the premises in controversy were and are within twenty miles of the line of said route.

5th. That on the 6th day of May, 1872, the said map of general route of said road was received and filed in the United States District Land Office at Helena, Montana.

6th. That on the 6th day of July, 1882, the plaintiff filed in the office of the Commissioner of the General Land Office its map definitely fixing the line of said road.

7th. That on the 21st day of June, 1883, the said map definitely fixing the line of said road was received and filed in the United States Land Office at Helena, Montana.

8th. That on the 5th day of October, 1868, one William M. Scott filed in the United States Land Office at Helena, Montana, that being the land district within which said

premises were then and now are situated, his pre-emption declaratory statement in writing under and in conformity with the provisions of the laws of the United States, wherein and whereby he made pre-emption claim to said premises in controversy herein with other tracts, alleging settlement the same day.

9th. That said Land Office accepted and filed and entered the said declaratory statement; and that the same was duly and regularly noted upon the records thereof.

10th. That the said declaratory statement and filing is still of record in said Land Office, and has never been cancelled.

11th. That in the year 1869 the said Scott built a cabin on said premises and lived there until the fall of that year, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he removed to the city of Butte, Montana; that he never returned to said land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and on said date abandoned the same.

12th. That on the 3d day of May, 1872, one William McLean duly applied, under the act of Congress approved May 20th, 1862, entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain," and the acts amendatory thereof, to enter the west half of the northwest quarter, southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of Section No. 17, Township

No. ten north of Range No. three west, and was then and there permitted by the Register and Receiver of the said United States Land Office at Helena, Montana. to enter said land in controversy under and in accordance with the provisions of said act of Congress, and that thereupon said McLean did make an affidavit as required by Section 2290 of the Revised Statutes of the United States, and filed the same with the Register of the said Land Office, and his said entry was then and there entered upon the records of said office.

13th. That the premises which are the subject of this action were included in both the pre-emption filing of the said Scott and the homestead filing of the said McLean.

14th. That on the 1st day of December, 1874, the Commissioner of the General Land Office wrote to the Register and Receiver of the U. S. Land Office at Helena, Montana, that the said homestead of said McLean was held for cancellation for the reason that the same was made subsequent to the time at which the right of the Northern Pacific Railroad Company attached thereto.

15th. That on the 3d day of July, 1879, the Register and Receiver of the United States Land Office at Helena, Montana, wrote to the Commissioner of the General Land Office that the said William McLean had been duly notified that his homestead entry was held for cancellation: that no action had been taken by him, and recommending the said entry for cancellation.

16th. That on the 11th day of September, 1879, the

Commissioner of the General Land Office wrote to the Register and Receiver aforesaid informing them that the said homestead entry had accordingly been cancelled.

17th. That there was no cancellation of McLean's homestead entry until September 11, 1879.

18th. That said McLean died in August, 1882.

19th. That on the 15th day of March, 1883, Maria McLean, the widow of said McLean, as such widow, applied to the said Land Office at Helena, Montana, to purchase said tract, and to perfect her husband's entry thereof, under the act of Congress approved June 15, 1880, and section 2291 of the Revised Statutes of the United States.

20th. That the plaintiff herein contested the said application; that the United States Land Office at Helena, Montana, awarded to the said Maria McLean the right to purchase said tract under said application; and that plaintiff herein appealed from said action to the Commissioner of the General Land Office.

21st. That on the 20th day of February, 1885, the Commissioner of the General Land Office sustained the said application of Maria McLean to purchase said tract, and affirmed the said decisions of the said Land Office at Helena, Montana, which action was sustained by the Acting Secretary of the Interior, H. L. Muldrow, on the 28th day of March, 1887, and a United States patent to the premises in dispute was awarded to the said Maria McLean.

22d. That the premises in dispute now are and were at the commencement of this action of the value of twenty thousand dollars: that the defendant, Maria McLean, is in possession of said premises in controversy herein as the grantee under the patent issued to her by the United States of America for said premises; and that the defendants other than the said Maria McLean are in possession of said premises as tenants under said patent, or as having obtained title through conveyances from the grantee named in said patent; and that all of the defendants' title is of the same quality.

23d. That the plaintiff herein, Northern Pacific Railroad Company, was incorporated, and authorized to equip and maintain its railroad and telegraph line, and was vested with all the powers and privileges necessary to carry into effect the purposes of the act, by an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast by the Northern Route," approved July 2nd, 1864, being the act referred to in Subdivision First of these findings.

Dated November 14th, 1892.

HIRAM KNOWLES,

Judge of the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

The evidence further shows that when Maria Amacker (McLean's widow) was seeking to "prove up" and obtain a

patent to the land, the defendant in error filed a contest, which was finally brought before H. L. Muldrow, Acting Secretary of the Interior, who decided the cause in favor of Mrs. Amacker, and held her entry for approval for patent.

SPECIFICATION OF ERRORS.

I.

The Court erred in admitting in evidence over defendants' objection so much of the certified copy of the tract book offered by plaintiff as reads: "Cancelled as per Commissioner's letter 'F' of Sept. 11th, 1879," to the admission of which counsel for plaintiffs in error objected for the reasons:

1st. That the letter itself would be the best evidence.

2d. Because it does not appear that McLean received any notice to appear and protect his right before the department.

Which objection was by the Court then and there overruled, and said paper was admitted in evidence.

To which ruling of the Court in allowing so much of the entry as reads "Cancelled, as Commissioner's letter 'F' of Sept. 11th, 1879" in evidence, counsel for the defendants then and there excepted.

The entry mentioned is as follows (the cancellation of

McLean's entry being shown by a line drawn through the same):

~~H. E. W. ½ N. W. ¼, and S. E. ¼ N. W. ¼, and S. W. ¼ N. E. ¼.~~

("Cancelled as per Commissioner's letter 'F' of Sep. 11, 1879.)

"Sec. 17, Township No. 10, N. Range No. 3 West, 160 acres, $1.25 per acre, purchase money $16.00. Wm. H. McLean, May 3, 1872. No. of receipt and certificate of purchase, 819."

II.

The Court erred in admitting in evidence over defendants' objection the letter dated July 3d, 1879, from the Register and Receiver to the Commissioner of the General Land Office, offered by plaintiff for the purpose of showing that McLean had been duly notified to appear and show cause why this entry should not be cancelled; which letter reads as follows:

UNITED STATES LAND OFFICE,
HELENA, MONTANA, July 3d, 1879.

Hon. Com. Gen'l Land Office, Washington, D. C.:

SIR:—We have the honor to report that June 2d, 1879, the applicants to the following homestead entries were duly notified in accordance with your circular of December 20th, 1873, to show cause within thirty days from date of said

notice why their entries should not be cancelled, and up to this date no action has been taken.

* * * * * *

No. 819, William McLean, W. ½ N. W. ¼, S. E. ¼ N. W. ¼, and S. W. ½ N. E. ¼, Sec. 17, 10 N., 3 W., made May 3, 1872.

* * * * * *

We would respectfully recommend that these homestead entries be cancelled.

Very respectfully,

J. H. MOE, Register.

F. P. STERLING, Receiver.

The said letter was offered by defendant in error to show that McLean had been duly notified to appear and show cause why his entry should not be cancelled. [Record p. 25.]

To which evidence and offer counsel for the defendants objected, for the reason that it does not appear what notification was given to McLean, and that the letter simply states as a conclusion of law that Mr. McLean was duly notified—what notice was given not being stated.

The objection was by the Court overruled, and the said letter admitted in evidence, to which ruling of the Court, admitting the said letter in evidence, counsel for the defendants then and there excepted.

III.

The Court erred in admitting in evidence over defend-

ants' objection the letter offered by plaintiff and dated Sept. 11th, 1879, from the Commissioner of the General Land Office to the Register and Receiver at Helena, Montana, cancelling the homestead entry of William H. McLean, which letter reads as follows :

F. O. 24,576.
O. 31,284. Sept. 11, 1879.

Register and Receiver, Helena, Montana, T.:

GENTLEMEN—I am in receipt of your letters of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified in accordance with the circular of Dec. 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz:

* * * * * * * *

No. 819, made May 3, 1872, by William McLean, W. ½ N. W. ¼. S. E. ¼ N. W. ¼, S. W. ¼ N. E. ¼ 17, 10 N., 3 W.

* * * * * * * *

In view of the fact that the above entries were held for cancellation in Nov. and Dec., 1874, and of the further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and have failed to establish their claims after due notice given, the said entries are hereby cancelled.

* * * * * *

Advise the parties in interest.

Very respectfully,

J. M. ARMSTRONG,
Acting Commissioner.

To which offer and evidence, counsel for the defendants objected, for the reason that it is incompetent and immaterial, and for the further reason that it does not appear that McLean was ever notified of the action of the department, or to appear and show cause why his entry should not be cancelled.

The objection was by the Court overruled, and the said letter admitted in evidence.

To which ruling of the Court, admitting said letter in evidence, Counsel for the defendants then and there excepted.

IV.

The Court erred in allowing over defendants' objection the witness William M. Scott to answer the following question, as to when he left the land covered by his pre-emption filing : "When did you leave it, if at all ?"

To which question counsel for the defendants objected as being immaterial and incompetent, for the reason that the filing appears of record and valid on its face, no abandonment having been filed.

The objection was by the Court overruled, to which ruling counsel for the defendants then and there excepted.

The answer of the witness was as follows :

A. I left it in the fall of 1869.

V.

The Court erred in allowing over the defendants' objection the witness William M. Scott to answer the following

question as to whether he afterward returned to the land: "Did you afterward return to the land?"

To which question counsel for defendants objected as being incompetent and immaterial because the filing appears of record, uncancelled, and valid on its face, no abandonment ever having been filed.

The objection was by the Court overruled, to which ruling counsel for defendants then and there excepted.

The answer of the witness was as follows:

A. No, sir.

VI.

The special findings found by the Court are not sufficient to support the judgment, in this: The findings show that after the grant of lands by Congress to plaintiff, and prior to the filing of its map of general route in the General Land Office, one William M. Scott, on the 5th day of October, 1868, duly made pre-emption claim to the premises in controversy, with other tracts, in conformity with the provisions of the laws of the United States; that said pre-emption filing was accepted, filed and noted on the records of the Land Office at Helena, Montana, and that said filing is still, and was at the time said map of general route was filed, of record and uncancelled.

That on the 3d day of May, 1872, and prior to the filing of plaintiff's map of general route in the United States Land Office at Helena, Montana, one William McLean, under and

in conformity with the laws of the United States, made homestead entry of the premises in controversy at said United States Land Office, at Helena, Montana.

That Maria McLean, the widow of said William H. McLean, purchased said premises in controversy under the act of Congress of June 15th, 1880, by virtue of said homestead entry, and that thereafter, to-wit., on the 17th day of June, 1887, a United States patent for the premises in controversy was issued to said Maria McLean.

CONTENTIONS OF PLAINTIFFS IN ERROR.

I.

The plaintiffs in error contend that the pre-emption filing of Scott, being valid upon its face and having been accepted and entered upon the records by the proper authorities, and being of record and uncancelled in the local land office at the time of the filing of the map of general route and at the time of the filing of the map of definite route, the land covered by that filing is not contained in the grant to defendant in error. All of which facts appear fully from the findings: and that the findings are not sufficient to support the judgment.

II.

The plaintiffs in error contend that their first contention is true, whether or not Scott continued to reside upon the land covered by his filing, and therefore the Court erred in

admitting Scott's testimony tending to show that he left the land in 1869 and did not afterward return.

III.

Plaintiffs in error contend that the pre-emption filing of Scott, having been made by him and accepted by the local land officers before the filing of the map of general route, and being then an existing filing valid upon its face:

a. That the land covered by said filing could not afterwards pass to the defendant in error by the grant.

b. That said land was not covered by the withdrawal clause, and was therefore subject to McLean's homestead entry.

IV.

The plaintiffs in error contend that the land, not being included in the withdrawal clause, the homestead entry of McLean was a valid entry, and the act of the Interior Department in cancelling the entry was without authority and void.

V.

The plaintiffs in error further contend that it was error to admit in evidence the letter of July 3d, 1879, written by the Local Land Officers for any purpose, and particularly for the purpose of showing that McLean was duly notified to show cause why his entry should not be cancelled.

VI.

The plaintiffs in error contend that the Court erred in admitting the letter of the Commissioner cancelling the McLean entry.

ARGUMENT.

First. In order to maintain this action, defendant in error (plaintiff below) must depend upon the strength of his own title, not upon the weakness of the title of the plaintiff in error.

Herbert vs. King, 1 Mont. Rep., 475.
City of Helena vs. Albertose, 8 Mont., 499.
Talbert vs. Hopper, 42 Cal., 398.
Treadway vs. Wilder, 8 Nev., 91.

Second. *The effect of Scott's filing:* Plaintiffs in error insist:

(*a.*) That, Scott having settled upon the land as a qualified pre-emptor, having made his declaratory statement, valid upon its face, which was filed and entered of record in the Land Office before the map of general route was filed, his filing being of record and uncancelled at the time of filing the map of definite route—the land was taken out of the grant, and this irrespective of the testimony given by Scott upon the trial.

See R. R. Co. vs. Dunmeyer, 113 U. S., 629.
R. R. Co. vs. Whitney, 132 U. S., 357.

Sioux City & I. F. Town Sur. Co. vs. Griffey, 143 U. S., 32.
Bardon vs. N. P. R. R. Co., 145 U. S., 535.
Whitney vs. Taylor, 45 Fed., 616.
McIntyre vs. Roeschlaub, 37 Fed., 556.

And under this heading we insist that the Court erred in admitting the testimony of Scott to the effect that he had left the land in the fall of 1869, and had not returned to it. See specifications of error Nos. 4 and 5 (pp. 47 and 48 of the Record), and also specified in this brief.

See cases last cited, in which it is declared :

"It is not conceivable that Congress intended to place these parties as contestants for the land with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation, with an interest to defeat their claims and to come between them and the Government as to the performance of their obligations."

See R. R. Co. vs. Dunmeyer, 113 U. S., 629.
R. R. Co. vs. Whitney, 132 U. S., 357.

See also a former hearing of this cause.

N. P. R. R. Co. vs. Amacker, 49 Fed., 529

In which the Court recognizes that the Company might have selected indemnity lands (p. 553). It is quite appar-

ent that if the right to indemnity lands existed in the case, it was because the land in question was taken out of the grant, and it follows that the land never did pass to the Company.

This error was quite material, for it will be seen from an inspection of the opinion of the Court below (Record p. 16) that the Court was controlled to a great extend by the view that Scott, having left the land, his right would not destroy the claim of the company.

In this connection we refer to a position which has always been pressed by counsel for defendant in error, and which was adopted by the learned Justice before whom the cause was tried, and who was misled equally by this position as by the one to which we have referred.

The claim made by counsel and the court below (Record, p. 15,) is to the effect that the cases cited by us do not apply where the right relied upon is one based merely upon the right to pre-empt, based only upon settlement and the filing of a declaratory statement, but are confined to a pre-emption entry, where proof has been made and the purchase price actually paid in the Local Land Office; and counsel and the Court below rely upon the cases of Bohall vs. Della, 114 U. S., 47; Frisbe vs. Whitney, 9 Wall., 187, and The Yosemite case, 15 Wall., 77.

That both the counsel and the Court have misapprehended the effect of those decisions will be quite apparent

from an inspection of the case next cited, in which the distinction is plainly shown:

See Shepley vs. Cowan, 91 U. S., 330.

In this case it will be seen that the rule claimed by counsel is confined to the right of the United States as against the pre-emption claimant.

We do not claim that the United States could not have excepted such rights, viz.: the right to pre-empt; but we do insist that the United States did not include in the grant lands covered by such filings. The terms of the grant show this plainly: "Whenever on the line thereof the United States shall have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights," etc.

Surely this includes the right to buy or pre-empt,—that is, it is claim or right to purchase.

And it is well settled that the company can take nothing by presumption; that its claim to the land must come plainly within the terms of the grant.

See Bardon vs. N. P. R. R. Co., 145 U. S., 533, and cases cited.
Wilcox vs. Jackson, 13 Pet., 498.

The cases cited above from the Supreme Court of the United States do not confine the rule to a pre-emption entry as distinguished from a pre-emption filing.

In the Dunmeyer case and the case of R. R. Co. vs. Whitney (cited), it is true that a homestead entry was involved, but in the case of Sioux City, etc., vs. Griffey, and Bardon vs. N. P. R. R. Co., a pre-emption filing was involved, and both these cases quote with approval the language of the Court in the Dunmeyer case, as follows:

"The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

The fact that the time to prove up had elapsed is no concern of the defendant in error. It was a matter between the United States and the claimant above.

See Whitney case, Dunmeyer case and other cases of U. S. Supreme Court.

See, also, particularly—

Whitney vs. Taylor, 45 Fed., 616.

As is said in that case, quoting from the Dunmeyer case: "With the performance of these conditions the company had "nothing to do."

The same rule has been adopted by the Land Department, which allows the claimant to prove up after the time fixed in the statute has elapsed.

See Dunlap vs. Raggio, 5 S. D., 440.
Davis vs. Davidson, 8 S. D., 417.

That the opinion of the Department is entitled to great weight.

See R. R. Co. vs. Whitney, 132 U. S., 357.

The penalty for not proving up in time, as fixed by the statute, is not forfeiture, but merely makes the land subject to "the entry of another purchaser," which the company is not.

See R. S. U. S., Sec. 2264.

(*b.*) Plaintiffs in error insist that the acceptance and recording of Scott's pre-emption entry took the land from without the grant, by virtue of Sec. 6 of the grant.

It has been held under similar grants, that the grant did not include land to which any lawful right was attached at the passage of the act creating the grant, because the lands were not "public lands" if any right had attached; because Congress could not be presumed as granting that to which others had obtained a right under another act of Congress; because (as said in the Leavenworth case):

"In the face of this, it is hard to believe that Congress meant to hold out inducements to the company to delay fixing the route of this road, until a contingency had happened, which the act did not contemplate. Besides the improbability that Congress would offer a premium for delay in making a railroad," etc.

All of these reasons apply with equal force to lands to which a right was attached when the map of general route

was attached. The language in the cases above cited is not confined to rights existing at the time of the filing of the definite map.

"The premium for delay" would be held out if lands covered by a filing when the map of general route was filed would thereafter pass to the company: if the company by delaying the filing of its definite map could discourage the settler and cause him to abandon his claim.

Moreover, it will be seen by Sec. 6 that all the "odd sections of land hereby granted shall not be," etc. Now the land granted was public land, free from other claims and rights; hence lands covered by any claim could not be withdrawn. Now, one of two conclusions must be reached: 1st, that all land within 40 miles of the general route, to which lands the company could obtain a right, were actually withdrawn when the general map was filed, and that lands within the above limit and not so withdrawn were not included in the grant; or that before one can say which lands are withdrawn by the filing of the general map, he must wait until the map of definite route shall be filed,—a difficulty noted by the learned Justice before whom this cause was heard. [Record, p. 18.]

Third—As to McLean's right.

That McLean had a right to make a homestead entry is certain—

1st. Because under the authorities cited, the land being

covered by an unexpired pre-emption filing when the general route was filed, the land was not withdrawn. See

N. P. R. R. Co. vs. Gjuve, 8 Land Dec., 380.
In re, Donovan, 8 L. D., 382.
R. R. Co. vs. Brown, 10 L. D., 662.

and the general principles announced in

Wilcox vs. Jackson, and
Bardon vs. R. R. Co., *supra*.

that land subject to a claim will not be presumed to be included in a subsequent disposition.

2d. Because the right was given by the act of April 21, 1876.

19 Stat. at Large, 35.

And this right could not be taken from him by the unauthorized act of the Interior Department.

Glidnen vs. R. R. Co., 30 Fed., 660.
N. P. R. R. Co. vs. Burt, 3 Land Dec., 490.
Shepley vs. Cowan, 91 U. S., 330.

3d. Had McLean lived he could have purchased the land under section 2 of the law of June 15, 1880 (Stat. at Large, Vol. 21, pages 237–238,) and this right was vested in his widow by section 2291, R. S., Ed. 1878.

See Whitney vs. Maxwell, 2 Land Dec., 98.
N. P. R. R. Co. vs. Burt, 3 Land Dec., 490.
N. P. R. R. Co. vs. McLean, 5 Land Dec., 529.

We respectfully submit to the Court, that upon all the questions of fact concerning the settlement of the prior pre-emption claimants and McLean, the doctrine of *res adjudicate* applies.

It appears from the Findings (Record P. 41) that there was a contest in the Land Office between McLean and the plaintiff; that, while a decision of that department upon a question of law is not decisive, still its decision of the facts is final.

See St. Louis Smelting Co. vs. Kemp, 104 U. S., 636.
U. S. vs. Minor, 114 U. S., 233.
Lee vs. Johnson, 116 U. S., 48.

It is claimed that McLean's entry being cancelled, whether correctly or not, when the definite map was filed, his claim could not defeat the claim of the defendant in error. This we deny:

1st. Because, as above stated, his filing took the land farm without the grant.

2d. Because the record itself would show that the cancellation was without jurisdiction and void.

(*a.*) Because the only authority to cancel a homestead entry is found in Section 2297, and the cancellation was made not because of abandonment, but because the time had elapsed for making final proof. And, in this regard, we submit that

the Court erred in admitting in evidence the letter of cancellation, there being no proof that notice was ever given, which error is contained in the assignment of errors.

All of which is respectfully submitted.

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AND THOS. C. BACH,
Attorneys for Plaintiffs in Error.